**Judicial Conference of the United States**

**Statement of**

**Chief Judge Edward R. Becker**

**United States Court of Appeals for the Third Circuit**

**Before the Committee on the Judiciary, United States Senate**

**On**

**S.220, The "Bankruptcy Reform Act of 2001"**

**February 8, 2001**

Mr. Chairman and members of the Committee:

My name is Edward Becker, and I am the Chief Judge of the United States Court of Appeals for the Third Circuit. I appear before you as a member of the Executive Committee of the Judicial Conference of the United States to present the position of the Judicial Conference with regard to S. 220, the ABankruptcy Reform Act of 2001.@ I thank you for the opportunity to appear today and would like to address six areas of concern to the judiciary: appeal of bankruptcy court decisions, need for new judgeships, re-allocation of revenues generated by filing fees, mandatory data collection, filing of tax returns with the bankruptcy court, and amendment of bankruptcy rules.

## Direct Appeals

The Judicial Conference strongly opposes section 1235 of the bill regarding expedited appeal of bankruptcy cases. As proposed, this provision would revise the basic structure for appeals from the orders of the bankruptcy court by providing that all bankruptcy court orders appealed to the district court would become orders of the district court 31 days after such appeal is filed, unless the district court decides the case within 30 days or extends the time period for decision. Functionally, this will result in all appeals from bankruptcy courts being routed directly to the United States Court of Appeals, depositing some four thousand new cases per year on these courts.

Turning first to the provisions of section 1235, I note that, as a general matter, the Judicial Conference opposes statutory litigation priorities, expediting requirements, or time limitation rules in specified types of civil cases beyond those few categories of proceedings already identified in 28 U.S.C. ' 1657 as warranting expedited review.[1] Mandatory priorities and expediting requirements run counter to principles of effective civil case management. Individual actions within a category of cases inevitably have different needs for priority treatment and are best determined on a case-by-case basis. In addition, as the number of categories of cases receiving priority treatment increases, the ability of a court to expedite review of *any* of these cases is restricted. Because 28 U.S.C. ' 1657 already authorizes the court to expedite a proceeding if Agood cause is shown,@ additional restrictions on federal courts are unnecessary.

Beyond creating general case management problems by imposing such a time limit on the district courts, the particularly short time limit imposed by the proposed legislation would undermine the administration of justice. The district court would be required either to extend the 30 day period as a matter of routine or to make a determination as to whether direct appeal is appropriate or not within the 30 day period. The 30 day period running from the date of filing the appeal is patently insufficient to allow practitioners the time needed to adequately brief the issue, much less to allow the district court adequate time for review. It is clear to me that, as a practical matter, this provision requires direct review of these cases in the court of appeals. The

[1]Report of the Proceedings of the Judicial Conference of the United States, September 1990, p. 80.

30 day layover in district court only increases costs to the litigants and will prove to be a meaningless step on the way to review by the court of appeals.

The Judicial Conference has concluded that the inevitable result of this provision will be to saddle the courts of appeals with thousands of new cases. According to a study of the Federal Judicial Center, it has the potential to increase bankruptcy appeals by 400%. The circuit courts now handle approximately 1,000 bankruptcy appeals each year. Under the proposed procedure, the courts may be faced with 4,000 new cases annually. Such a precipitous increase in the caseloads of the courts of appeals is utterly unprecedented. All of the chief judges of the twelve regional circuit courts of appeals strongly oppose this provision. Many of these courts maintain incredibly high workloads while being chronically shorthanded. A significant increase in the volume of bankruptcy appeals exacerbates a grievous problem and negatively affects the prompt and effective processing of all appeals.

The proposal is particularly unfair to parties to a bankruptcy appeal. It will most certainly increase the cost of the appeal. Practice, including briefing, is more complicated and time consuming in appellate courts than in district courts. Attorney fees and other costs to the parties will increase in 80% of all appeals, the percentage of appeals that currently proceed no further than the district courts. Further, appeals are handled far more expeditiously in district courts than in courts of appeals. Indeed, the current system is working well; the district judges by and large do a good job with these cases. In sum, the proposal provides for increased expense and

increased delay for parties to a bankruptcy appeal, and attempts to fix something that Aain=t broke.@

The Judicial Conference recommends a proposal for expedited appeal of a targeted number of bankruptcy cases which is attached hereto. This proposal redresses the primary complaints regarding the existing statutory scheme for bankruptcy appeals: the need for expeditious final disposition of appeals in time sensitive cases (where the success of a reorganization depends upon a quick decision), and putative inefficiency in the development of binding precedential case law.[2] The Judicial Conference proposal will solve these problems without creating the aforementioned unnecessary problems for litigants and the courts of appeals.

The Conference position is that bankruptcy court orders should be reviewable directly in the courts of appeals if, upon certification from the district court or bankruptcy appellate panel, the court of appeals determines that (1) a substantial question of law or matter of public importance is presented and (2) an immediate appeal to the court of appeals is in the interests of justice. This would allow direct appeal where necessary to establish precedential case law and meet special needs of parties, while leaving intact the basic bankruptcy appellate structure. Most bankruptcy appeals are currently resolved effectively by the district courts or by the parties, as shown by a Federal Judicial Center review reflecting that 73% of bankruptcy

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[2]The argument is made that direct appeals to the court of appeals will create more precedent AND that more precedent will lead to more certainty in the law and less litigation. My thirty years experience on the federal bench tells me that the opposite is true. More precedent leads to more litigation.

appeals in the district courts were resolved with little or no judicial involvement. By preserving the district court as a forum for meaningful review, the Conference proposal satisfies two objectivesBit allows for timely resolution of appeals at minimal cost to litigants, and it facilitates the establishment of precedential case law in bankruptcy without placing undue burdens on the courts of appeals.

## Judgeships

Section 1225 of the bill would create 23 new temporary bankruptcy judgeships and extend the existing temporary judgeships in the northern district of Alabama, the district of Puerto Rico, and the eastern district of Tennessee for a period of three years, and extend the existing temporary judgeship in the district of Delaware for a period of five years. The section also contains a provision to extend the temporary judgeship in the district of South Carolina for a period of three years. Because the term of South Carolina=s temporary judgeship lapsed on December 31, 2000, however, the bill will no longer have its intended effect with regard to that judgeship. The term of a judgeship that no longer exists cannot be extended. Therefore, the bill needs to Are-authorize@ that judgeship by including it among the new judgeships created by the bill.

The bill falls somewhat short of the needs of the judiciary. The Judicial Conference recommends authorization of 23 judgeships provided for in the bill, as well as an additional judgeship in the district of Maryland and a judgeship in the district of South Carolina to replace the lapsed judgeship. In addition, the Conference urges that 13 of these judgeships be

established on a permanent basis[3] and the other 12 on a temporary basis;[4] that the current temporary judgeships in the district of Puerto Rico, the northern district of Alabama and the district of Delaware be converted to permanent positions; and, that the temporary judgeship in the eastern district of Tennessee be extended for a period of five years.

The Judicial Conference is required by law to submit recommendations to Congress regarding the number of bankruptcy judges needed and the districts in which such judgeships are needed.[5] This requirement has engendered a process whereby the need for additional judgeships is assessed on a biennial basis. The bankruptcy and district courts provide recommendations to their respective judicial councils. The judicial councils= recommendations are then subject to on-site surveys of the districts for which judgeships are requested.

Under the direction of the Conference Committee on the Administration of the Bankruptcy System, the surveys include a thorough review of the dockets in each respective court and interviews with the chief district judge, the bankruptcy judges, the bankruptcy clerk, the United States Trustee, and local bankruptcy attorneys. Suggestions for improvements in case management and methods to achieve greater efficiencies are solicited by the survey team. The

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[3]District of Delaware (1), District of New Jersey (1), District of Maryland (3), Eastern District of Virginia (1), Eastern District of Michigan (1), Western District of Tennessee (1), Central District of California (3), Southern District of Georgia (1) and Southern District of Florida (1).

[4]District of Puerto Rico (1), Northern District of New York (1), Eastern District of New York (1), Southern District of New York (1), Eastern District of Pennsylvania (1), Middle District of Pennsylvania (1), Eastern District of North Carolina (1), Southern District of Mississippi (1), Eastern District of California (1), Central District of California (1), Southern District of Florida (1) and District of South Carolina (1).

[5]28 U.S.C. ' 152(b)(2).

survey team then prepares a written report and recommendation regarding each respective district that is submitted to the Committee=s Subcommittee on Judgeships. The Subcommittee reviews each request for additional judgeships and survey report and then forwards these materials, with its recommendation, to the requesting appellate, district and bankruptcy courts for additional comment. All relevant materials are then provided to the full Committee, which makes recommendations to the Judicial Conference. The Conference makes its determination on the need for each requested judgeship and then submits its recommendation to Congress.[6]

Various factors are considered in this process for determining the need for new judgeships. The most significant factor is the Aweighted judicial caseload@ of each bankruptcy court. This figure is derived from a formula established as a result of a time study of the bankruptcy courts conducted by the Federal Judicial Center during 1988 and 1989. Absent exigent circumstances, the Judicial Conference considers requesting an additional judgeship only when the caseload of a court exceeds 1500 weighted filings per judge. In those instances in which the addition of a judgeship would result in a decrease of the caseload below 1500 weighted filings, the Conference seeks a temporary position; in those instances in which the weighted filings would remain above 1500 per judge even with the addition of another judge, the Conference seeks a permanent position.

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[6]It should be noted that in those instances in which Congress declines to authorize the requested judgeships, the on-site survey process is not necessarily repeated before the request is renewed. Nevertheless, review of each request is conducted to determine whether or not the underlying justification for the request has changed to the extent that an on-site survey should be repeated.

Other factors which are taken into consideration during this review process, especially in those districts with case weights near the 1500 weighted filings threshold, include the nature and mix of the caseload of the court; historical caseload data and filing trends; geographic, economic and demographic factors; effectiveness of the case management efforts of the court; and, the availability of alternative resources for handling the caseload of the court.

Additional bankruptcy judgeships have not been authorized by Congress since 1992 when 35 new judgeships were approved. In response to a substantial increase in case filings, the Judicial Conference has made recommendations to Congress for additional bankruptcy judgeships in 1993, 1995, 1997 and 1999. These judgeships have not as yet been authorized by Congress.

The need for the required additional judicial officers is great. Bankruptcy filings continue at very high levels and well over a million cases are pending in our bankruptcy courts. While the judiciary employs a number of creative strategies to manage ever increasing caseloads, including the use of temporary bankruptcy judges, recalled bankruptcy judges, inter- and intracircuit assignments, additional law clerks, and advanced case management techniques, there remains a dire need for more judicial resources to handle the burgeoning judicial workload.

## Filing Fees

Section 325 of the bill amends the statutory filing fees for chapter 7 and chapter 13 cases and re-allocates a portion of the revenues generated by such fees from the judiciary and the Treasury general fund to the United States Trustee program. This amendment will reduce revenues to the judiciary of approximately $ 5 million per year. While the Judicial Conference takes no position regarding the proposed reduction of revenue to the Treasury general fund, it strongly opposes reducing revenue currently allocated to the judiciary and providing it to the United States Trustees. The existing fee structure takes into account the significant costs the judiciary bears in administering the Bankruptcy Code. The costs of the United States Trustees are far exceeded by the costs of maintaining 324 bankruptcy judgeships and the staffs and facilities for these judgeships.

The current fee schedule took effect in December 1999.[7] That schedule reflects an increase of $ 25 in the filing fee for both chapter 7 and chapter 13 cases to a total of $ 155, and allocates the increased filing fee revenue equally between the judiciary and the United States Trustee program. Assuming total filings of approximately 1.3 million per year, as based upon fiscal year 2000 figures, this increase would annually generate approximately $ 16.25 million each for the judiciary and the United States Trustee program. The increase was enacted with an understanding by the Appropriations Committees that these funds were required by the judiciary to meet its current statutory responsibilities, without taking into account any additional funding that would be required to meet the new responsibilities imposed by the bankruptcy reform legislation.

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[7]Omnibus appropriations bill for fiscal year 2000 (Pub. L. No. 106-113).

This bill would further revise filing fees to $ 160 for chapter 7 cases and $ 150 for chapter 13 cases and reduce that portion of the filing fee that is allocated to the judiciary from $ 52.50 as provided under current law to $ 50.00 in chapter 7 cases and $ 45.00 in chapter 13 cases. Assuming the annual filing of approximately 900,000 chapter 7 cases and 400,000 chapter 13 cases, this provision would have the effect of reducing revenues to the judiciary by over $ 5 million per year, while increasing revenues to the United States Trustee program by over $ 7 million per year.

The Judicial Conference strongly opposes this re-allocation of revenues at a cost to the judiciary of more than $ 25 million over the next five years. Not only are these funds required by the judiciary to meet its current statutory responsibilities, but other provisions of this bill will require additional expenditures by the judiciary of an estimated $ 80 million during the same five year period. Moreover, revising filing fees that took effect only 14 months ago, with all the attendant administrative costs and disruptions, would seem to be an unwise expenditure of taxpayer funds.

## Data Collection

Section 601 of the bill directs the clerks of court to collect, and the Administrative Office to compile and report, financial data of consumer debtors and certain categories of case event statistics in consumer bankruptcy cases. The Congressional Budget Office estimates that this requirement will cost the judiciary $ 30 million over the next five years.

The Judicial Conference is opposed to the provisions of the bill that direct the judiciary to collect and report financial data that is unnecessary to fulfill its responsibility to report to Congress and the public information on the adjudication of cases. Under these provisions, the financial data is to be derived from the schedules and statements filed by consumer debtors. This information, filed by debtors at the outset of bankruptcy cases and in many instances without the assistance of a lawyer, is, at best, of questionable reliability.[8] Both assets and liabilities are frequently valued inaccurately by consumer debtors, and some debt simply cannot be valued definitively at the outset of the case because it is unliquidated, contingent or disputed. Therefore, these provisions will not generate Aimproved bankruptcy statistics,@ but will impose significant costs upon the taxpayers.

A far superior approach, in our view, is to append the responsibility to collect, compile and report financial data to the responsibility of the United States Trustees to conduct audits under the bill. This approach would have two significant benefits: it would yield audited, and thus accurate, data, and it would accomplish this at a fraction of the cost to the taxpayer. We believe that this data would meet the needs of Congress to conduct a continuing assessment of the functioning and effectiveness of the bankruptcy system. The staff of the Administrative Office is prepared to work with congressional staff to craft an appropriate replacement for the provision that currently appears in this legislation.

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[8] *See* Report of the National Bankruptcy Review Commission, vol. 1, ch. 4 (October 20, 1997).

In the event Congress is committed to imposing the responsibility to collect, compile and report financial data upon the judiciary, we respectfully request extension of the date upon which this provision would take effect. Compliance with these new requirements will require revising official bankruptcy forms, developing new statistical data fields, training clerks in entering additional data into our computer systems, devising data extraction programs, and reprogramming Administrative Office statistical compilation programs. We will also have to coordinate with forms publishers and software developers so that the new forms can be made available to attorneys and debtors. In order for these responsibilities to be met in an accurate and thorough manner, we recommend that the provisions regarding collection and reporting of financial data be revised to take effect 24 months after enactment of the bill, with the first report due to Congress no later than 36 months after enactment of the bill.

The bill also requires the bankruptcy clerks and the Administrative Office to collect and report certain case event statistics. While the judiciary is the appropriate entity to collect and report this information, this responsibility would similarly pose a significant problem. Events occurring in bankruptcy cases are reported to the Administrative Office through the electronic case management systems of the courts. The current systems, however, are nearing the end of their useful lives and cannot collect additional information of the sort required by these bills. To upgrade these systems to meet the requirements of this legislation would require a major financial investment, contrary to good government and common sense, and divert resources from and delay the development and deployment of a new, modern electronic case management system that is in the process of being deployed in the bankruptcy courts.

This new system will not be installed and operating in all districts for at least three and a half years. Accordingly, if the judiciary is to be required to collect and report these case event statistics system-wide, we urge that this provision be revised to take effect 48 months after enactment of the bill, with the first report due to Congress no later than 60 months after enactment of the bill.

## Income Tax Returns

The bill requires chapter 7 and chapter 13 debtors, upon request of a creditor, to file with the bankruptcy court copies of federal income tax returns for the three year period preceding the order for relief and for the period during which the case is pending. The bill further requires the court to limit access to the returns pursuant to security procedures promulgated by the Director of the Administrative Office and requires the court to destroy the returns three years after the case is closed.

Implementation of this provision would entail development and maintenance of a filing system separate from the public case files, with access limited to trustees and parties in interest. Court files, with the narrow exception of sealed records, are public records available on request. Because the sealing of records is relatively rare, sealed records can be easily segregated from the public case file. The routine filing of tax returns, however, would be problematic.

Recognizing that tax returns are not to be made available to the public, the bill requires the Director of the Administrative Office to establish procedures to safeguard the confidentiality of tax information and to establish a system to make the information available to the United States trustee, case trustee, and any party in interest. To carry out this responsibility, it would be necessary to establish a separate filing system for tax returns in each clerk=s office, as well as to provide personnel to manage it so that unlawful dissemination of this information would not occur. This would be a costly undertaking requiring additional office space and personnel.

As the United States Trustee=s files are not public records, limiting access to trustees and parties in interest would not require segregating tax returns and creating separate procedures governing access to them. The Trustee=s office also has personnel and procedures in place to deal with debtors. While the Trustees may well need some additional resources to meet this responsibility, that cost should be far less than the cost of establishing a new separate system in each clerk=s office.

Accordingly, the Judicial Conference takes the position that the bankruptcy courts should not be required to maintain tax returns filed by debtors, which are typically of no use in the administration of bankruptcy cases. The Conference believes that responsibility for collection and maintenance of these tax returns would be more appropriately assigned to the United States Trustees, who are responsible for supervising and estates and approving distributions to creditors.

## Bankruptcy Rules

Section 102 of the bill establishes standards governing sanctions for abusive filings that are inconsistent with Bankruptcy Rule 9011. In addition, section 319 states the sense of Congress suggesting several changes to Bankruptcy Rule 9011. The cumulative effect of the provisions will cause confusion and needless satellite litigation. Accordingly, they should be deleted from the bill.

There are six provisions in the bill that directly task the Supreme Court or the Judicial Conference or its Advisory Committee on Bankruptcy Rules to promulgate a bankruptcy rule or an official form to implement a new requirement added by an amendment of the Bankruptcy Code. Section 221 amends section 110 of the Code to require bankruptcy petition preparers to provide to the debtor a notice, the contents of which are detailed in section 110(2)(B). The provision states that the notice shall be an official form issued by the Judicial Conference. Section 419 requires the Judicial Conference=s Advisory Committee on Bankruptcy Rules, after considering the views of the Executive Office for United States Trustees, to propose for adoption rules and forms to assist a debtor to disclose the value, operations, and profitability of any closely-held business. Section 433 requires the Advisory Committee to propose for adoption a standard form disclosure statement and plan of reorganization for small businesses. Section 435 requires the Advisory Committee to propose for adoption rules and forms for small-business

debtors to file periodic financial and other reports. Section 716 expresses the sense of Congress that the Advisory Committee propose rules amending Bankruptcy Rules 3015 and

3007 to extend deadlines for governmental units to object to confirmation of chapter 13 plans and to restrict the rights of interested parties to object to tax claims until the filing of a required tax return. Finally, section 1234 takes the extraordinary step of amending the Rules Enabling Act to prescribe the form to assist a debtor to report monthly income and expenses required to implement amended section 521 of the Code.

These provisions are unnecessary because the Advisory Committee automatically reviews any legislation amending the Bankruptcy Code to identify and prescribe any needed amendments to rules and forms. More importantly, directing the Judicial Conference or one of its committees to amend a particular rule or form bypasses the initial stages of the Rules Enabling Act process and needlessly undercuts in varying degrees the proper role of the Judicial Conference and its committees, the bench and bar, the public, and the Supreme Court in that process.

## CONCLUSION

In conclusion, the Judicial Conference urges the Committee to amend the legislation to replace the expedited appeal provision with the Judicial Conference proposal, to re-authorize the lapsed South Carolina judgeship and provide the other needed judgeships, to leave intact the current filing fee structure, to re-assign the responsibility to compile and report financial data and maintain tax returns to the United States Trustee program, which is better suited to meet these responsibilities, to extend the effective date for collection and reporting of case event

statistics by the bankruptcy clerks and Administrative Office, and to delete the provisions regarding amendment of bankruptcy rules.

Again, thank you very much for this opportunity to appear before the Committee. I am prepared to answer any questions that you may have.

**SEC.____ BANKRUPTCY APPEALS**

(a) APPEALS.—Section 158 of title 28, United States Code, is amended—

(1) in subsection (c)(1) by striking out "Subject to subsection (b),@ and inserting in lieu thereof "Subject to subsections (b) and (d)(2),@; and

(2) in subsection (d)—

(A) by inserting "(1)@ after "(d)@; and

(B) by adding at the end of that subsection the following new paragraph:

"(2) A court of appeals that would have jurisdiction of a subsequent appeal under paragraph (1) or other applicable law may, in its discretion, permit an immediate appeal to itself, in lieu of further proceedings in a district court or before a bankruptcy appellate panel exercising appellate jurisdiction under subsection (a) or (b), if the district court or bankruptcy appellate panel hearing an appeal certifies, that—

A(A) a substantial question of law or matter of public importance is presented in the appeal pending in the district court or before the bankruptcy appellate panel; and

A(B) the interests of justice require an immediate appeal to the court of appeals of the judgment, order, or decree that had been appealed to the district court or bankruptcy appellate panel.@

(b) PROCEDURAL RULES.CUntil rules of practice and procedure are promulgated or amended under the Rules Enabling Act (28 U.S.C. '' 2071-2077) to govern appeals to a court of appeals exercising jurisdiction under section 158(d)(2) of title 28, as added by this Act, the following shall apply:

(1) A district court or bankruptcy appellate panel may enter a certification as described in section 158(d)(2) during an appeal to the district court or bankruptcy appellate panel under section 158(a) or (b).

(2) Subject to the other provisions of this subsection, an appeal by permission under section 158(d)(2) must be taken in the manner prescribed in Rule 5 of the Federal Rules of Appellate Procedure.

(3) When permission to appeal is requested on the basis of a certification of a district court or bankruptcy appellate panel, the petition must be filed within 10 days after the district court or bankruptcy appellate panel enters the certification.

(4) When permission to appeal is requested on the basis of a certification of a district court or bankruptcy appellate panel, a copy of the certification must be attached to the petition.

(5) When permission to appeal is requested in a case pending before a bankruptcy appellate panel, the terms Adistrict court@ and Adistrict clerk,@ as used in Rule 5 of the Federal Rules of

Appellate Procedure, mean Abankruptcy appellate panel@ and Aclerk of the bankruptcy appellate panel.@

(6) When a court of appeals grants permission to appeal, the Federal Rules of Appellate Procedure apply to the proceedings in the court of appeals, to the extent relevant, as if the appeal were taken from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under section 158(a) or (b).

## SECTION-BY-SECTION ANALYSIS

*Section ____. Bankruptcy appeals*

Currently, decisions of bankruptcy judges can be appealed either to (a) the district court for the respective district or (b) to a bankruptcy appellate panel of three bankruptcy judges. Further appeals lie from the district court or bankruptcy appellate panel to the court of appeals for the circuit.

In practice, this approach to bankruptcy appeals has had difficulty fastening certainty and predictability in bankruptcy law. Unlike those of a court of appeals, decisions of a district court acting as an appellate court or a bankruptcy appellate panel have no *stare decisis* value or, in other words, are not binding beyond a particular case.

To address that problem without sacrificing the economy to the parties of review by a single district court judge, this section amends section 158 of title 28 to permit an appeal to be heard directly by the court of appeals if the district court or bankruptcy appellate panel certifies that 1) the appeal presents a substantial question of law or matter of public importance, and 2) an immediate appeal to the court of appeals is in the interests of justice, and if the court of appeals agrees to hear the matter. Since this creates a new route of appeal, this section provides interim procedures until permanent rules can be prescribed under the Rules Enabling Act.

This section preserves the option of prompt, inexpensive review in the district court for cases in which the parties need it--*i.e.*, fact-intensive cases, small cases, and cases where the parties only want a quick Asecond look@ by another source. It also provides for direct review by the court of appeals so that binding precedent can be created in those cases and for those issues meriting that treatment, without flooding the courts of appeals with all bankruptcy appeals.